FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 9, 2005

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2005-19

Mr. Emil Franzi
Inside Track Productions
P.O. Box 2128
Tucson, AZ 85702

Dear Mr. Franzi:

We are responding to your advisory opinion request concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to "The Inside Track," a weekly radio program that you produce and air in Tucson, Arizona. The Commission concludes that any discussion and interviewing of Federal candidates on "The Inside Track" program within 30 days of a primary election or 60 days of a general election is exempt from the prohibition on corporate funding of electioneering communications under the press exemption in the Act and Commission regulations. Moreover, any costs incurred in the production and broadcast of The Inside Track are similarly exempt from the Act's prohibitions on corporate contributions and expenditures under the press exemption.

Background

The facts presented in this advisory opinion are based on your letter received on October 13, 2005, and phone conversations that occurred on October 18, 2005 and November 15, 2005.

You are the host of the radio talk show "The Inside Track," which is broadcast on KJLL in Tucson, Arizona. KJLL broadcasts to virtually the entire metropolitan area of Tucson, reaching a potential audience of approximately 400,000 people, including at least 50,000 people in both Arizona's Seventh and Eighth Congressional Districts. You also operate a for-profit corporation, Paradigm Shift Productions, which purchases airtime on KJLL in order to air The Inside Track. Paradigm Shift Productions then sells advertising on the program to recoup the costs of the airtime.

Neither Paradigm Shift Productions nor KJLL is in any way owned or controlled by any political party, political committee, or candidate. In addition, you are not an officer or employee of any political party or political committee. Finally, you are not currently a candidate for Federal office.

Politics is the major focus of discussion on The Inside Track. As a result, throughout 2006 the program will include discussions of candidates for the United States Senate and House of Representatives, interviews with these candidates, and comments and questions from callers that mention these candidates. You have stated that the candidates you will discuss and interview include those running for Senate in Arizona and for the House of Representatives in Arizona's Seventh and Eight Congressional Districts. These activities would occur within 30 days of the Arizona primary election on September 12, 2006 or 60 days of the November 7, 2006 general election.

Question Presented

May Paradigm Shift Productions produce The Inside Track and purchase airtime to broadcast it within 30 days of a primary election or 60 days of a general election if the program mentions or clearly identifies a Federal candidate?

Legal Analysis and Conclusions

The Commission concludes that Paradigm Shift Productions may produce The Inside Track and purchase airtime to broadcast it within 30 days of a primary election or 60 days of a general election if the program mentions or clearly identifies a Federal candidate because the proposed activities fall within the press exemptions to the prohibition on corporate funding of electioneering communications and the definitions of "contribution" and "expenditure."[1]

I. Electioneering Communications

The Act and Commission regulations define an "electioneering communication" as any broadcast, cable, or satellite communication that refers to a clearly identified candidate for Federal office; is publicly distributed for a fee[2] within 60 days before a general, special or runoff election for the office sought by the candidate, or within 30

[1] While your request specifically addresses the question of communications during the electioneering communications time frames, it also implicates the Act's prohibitions on corporate contributions and expenditures.

[2] The "for a fee" requirement of the electioneering communications test has been the subject of litigation in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir 2005), petition for rehearing *en banc* denied Oct. 21, 2005. The United States Court of Appeals for the District of Columbia Circuit affirmed the District Court's ruling that the addition of the "for a fee" requirement violated Congress's clearly expressed intent under step one of the analysis required by *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). 414 F.3d at 109. The Commission has a pending rulemaking to determine how to amend the electioneering communication regulations to comply with these court opinions. However, the analysis in this advisory opinion is not dependent on the "for a fee" requirement.

days before a primary or preference election for the office sought by the candidate; and in the case of a candidate for the U.S. Senate or House of Representatives, is targeted to the relevant electorate. *See* 2 U.S.C. 434(f)(3) and 11 CFR 100.29(a). A communication is targeted to the relevant electorate if it can be received by 50,000 or more persons:

(1) in the district the candidate seeks to represent, in the case of a candidate for Representative; or

(2) in the State the candidate seeks to represent, in the case of a candidate for Senator. 2 U.S.C. 434(f)(3)(C); 11 CFR 100.29(b)(5).

Any broadcast of The Inside Track that refers to a clearly identified candidate for the Senate in Arizona, or for the House of Representatives in the Seventh or Eighth Congressional Districts of Arizona during the electioneering communication windows would satisfy the general test for an electioneering communication. It would be publicly distributed for a fee because it would be broadcast through the facilities of a radio station and Paradigm Shift Productions would purchase the airtime. 11 CFR 100.29(b)(3)(i). Because KJLL is capable of reaching more than 50,000 listeners in the State of Arizona, including in the Seventh and Eighth Congressional Districts of Arizona, the communication would be targeted to the relevant electorate of Arizona Senatorial candidates and Seventh and Eighth District House candidates. 11 CFR 100.29(b)(5).

II. Electioneering Communications Press Exemption

Corporations are generally prohibited from making or financing electioneering communications. 2 U.S.C. 441b(b)(2) and 11 CFR 114.2(b)(2)(iii). However, the Act and Commission regulations provide an exemption for any communication that appears in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate, in which case additional limitations apply. 2 U.S.C. 434(f)(3)(B)(i) and 11 CFR 100.29(c)(2). This exclusion is known as the "press exemption."

The Commission has applied a two-step analysis to determine whether the press exemption applies. First, the Commission asks whether the entity engaging in the activity is a press entity as described by the Act and Commission regulations. *See e.g.* Advisory Opinions 2005-16, 2004-07, 2003-34, 2000-13, and 1998-17. The analysis of whether an entity is a press entity does not necessarily turn on the presence or absence of any one particular fact. Second, in determining the scope of the exemption, the Commission considers: (1) whether the press entity is owned or controlled by a political party, political committee, or candidate; and (2) whether the press entity is acting as a press entity in conducting the activity at issue (*i.e.*, whether the entity is acting in its "legitimate press function"). *See Reader's Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1312-1313 (D.D.C. 1981); Advisory Opinions 2005-16, 2004-07, 2000-13, 1996-48, and 1982-44.

Paradigm Shift Productions is in the business of producing on a regular basis a radio program that disseminates news stories, commentary and/or editorials. It also buys airtime to broadcast the program and resells some of that airtime for third party advertisements. Therefore, the Commission concludes that Paradigm Shift Productions is a press entity.

The Commission also concludes that Paradigm Shift Productions would be acting as a press entity when conducting the proposed activity. Because The Inside Track will discuss political issues through a radio broadcast, any reference to a clearly identified Federal candidate during its broadcast would occur "in a news story, commentary, or editorial." 11 CFR 100.29(c)(2). *See also* Advisory Opinion 2005-16 (availability of an entity's activities "to the general public" is a key consideration in determining whether the press exemption applies). Paradigm Shift Productions was created to produce and disseminate this radio program, and therefore would be acting in its legitimate press function when it distributes The Inside Track.[3]

Your request specifically identifies three scenarios where The Inside Track would broadcast a communication that refers to a Federal candidate during the electioneering communications timeframe: (1) you, as the program host, mention a candidate on the air, (2) a candidate is interviewed on the program, and (3) a person calling into the program mentions a candidate. The Commission concludes that all of these activities during The Inside Track's broadcast would be legitimate press functions; thus they would come within the press exemption in the Act and Commission regulations.[4] Therefore, Paradigm Shift Productions may produce, and purchase airtime for, the program that mentions or clearly identifies a Federal candidate, including when you mention a candidate, a candidate is interviewed and when a caller mentions a candidate, without violating the prohibition on corporate funding of electioneering communications.[5]

III. Contributions and Expenditures Press Exemption

For the reasons described above, the proposed activities would not violate the Act's prohibition on corporate contributions and expenditures. The Act prohibits "any corporation whatever" from making any contribution or expenditure in connection with a Federal election. 2 U.S.C. 441b(a). The Act and Commission regulations define the terms "contribution" and "expenditure" to include any gift of money or "anything of value" for the purpose of influencing a Federal election. *See* 2 U.S.C. 431(8)(A) and (9)(A); 11 CFR 100.52(a) and 100.111(a). However, there is an exemption for "any cost incurred in covering or carrying a news story, commentary, or editorial by any

[3] The Commission also notes that neither Paradigm Shift Productions nor KJLL are owned or controlled by any political party, political committee, or candidate.
[4] The Commission has previously determined that on-air interviews of candidates are within the press exemption, provided that the broadcaster complies with all applicable requirements of the Communications Act (47 U.S.C. 315(a) and (b)) and Federal Communications Commission regulations. *See* Advisory Opinions 2004-07 and 1987-08.
[5] In the alternative, you ask if changing the financial arrangement between Paradigm Shift Productions and KJLL would permit the activity. Because the Commission has determined that your proposed activities are exempted from the electioneering communications restrictions, this question is moot.

broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine, or other periodical publication . . . unless the facility is owned or controlled by any political party, political committee, or candidate[.]" 11 CFR 100.73 and 11 CFR 100.132; *see also* 2 U.S.C. 431(9)(B)(i). As in the electioneering communication context, this exclusion is also known as the "press exemption." According to the House Report on the 1974 amendments to the Act, the press exemption made plain Congress's intent that the Act would not "limit or burden in any way the first amendment freedoms of the press" and would assure "the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns." *H.R. Rep. No. 93-1239, 93d Cong., 2d Sess.* at 4 (1974).

This exemption would apply to The Inside Track and Paradigm Shift Productions. As discussed above, Paradigm Shift Productions is a press entity. Its production of, and purchasing of airtime for, The Inside Track constitutes "covering or carrying a news story, commentary, or editorial." The Commission notes that an entity otherwise eligible for the press exemption would not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial, even if the news story, commentary, or editorial expressly advocates the election or defeat of a clearly identified candidate for Federal office. *See* First General Counsel's Report, MUR 5449 (CBS Broadcasting, Inc.) ("Even seemingly biased stories or commentary by a press entity can fall within the media exemption."). *See also* Advisory Opinion 2005-16. The proposed activities described in your request would come within the exemption in 2 U.S.C. 431(9)(B)(i) and would not violate 2 U.S.C. 441b. *See also* 11 CFR 100.73 and 11 CFR 100.132. Therefore, any disbursements made to produce or broadcast The Inside Track are not prohibited corporate contributions or expenditures under the Act.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Scott E. Thomas
Chairman

Enclosures: Advisory Opinions 2005-16, 2004-07, 2003-34, 2000-13, 1998-17, 1996-48, 1987-08, and 1982-44

CONCURRING OPINION

CHAIRMAN SCOTT E. THOMAS
COMMISSIONER DANNY LEE MCDONALD

ADVISORY OPINION 2005-19

At issue in Advisory Opinion 2005-19 was whether a radio program proposed by Paradigm Shift Productions, a for-profit corporation, would be exempt from the prohibition on corporate funding of an "electioneering communication" or a "contribution or expenditure" under the so-called 'press exemption.' The program would involve discussion and/or interviews of federal candidates on occasion. We agreed with the Commission's conclusion that "Paradigm Shift Productions is a press entity," Advisory Opinion 2005-19 at 4, and that its proposed activity was exempt from the relevant statutory restrictions under the press exemption. As we recently pointed out in Advisory Opinion 2005-16,[6] though, qualification for the press exemption is a fact-specific determination. Accordingly, we found the activity at issue permissible because of the specific facts presented by this requestor.

The Federal Election Campaign Act ("FECA" or "the Act") prohibits corporations from making or financing "electioneering communications," which generally include radio or TV communications within 30 days of a primary election or 60 days of a general election that mention a federal candidate. 2 U.S.C. §§ 434(f)(3); 441b(a), (b)(2). The Act also prohibits corporations from making any "contribution or expenditure" from corporate treasury funds in connection with a federal election. 2 U.S.C. § 441b(a). The Act defines a "contribution or expenditure" to include "any direct or indirect payment, . . . loan , advance, . . . or gift of money, or any services, or anything of value . . . in connection with" a federal election. 2 U.S.C. § 441b(b)(2).

The Act, nonetheless, specifically excludes certain press activities from the definition of "electioneering communication" as well as from the definition of "contribution or

[6] *See* Advisory Opinion 2005-16, Concurring Opinion of Chairman Scott E. Thomas and Commissioner Danny Lee McDonald at 4 (November 29, 2005).

expenditure." *See* 2 U.S.C. § 434(f)(3)(B)(i) and 2 U.S.C. § 431(9)(B)(i).[7] Qualification for this press exemption is reserved for:

> any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.

2 U.S.C. § 431(9)(B)(i); *see also* 2 U.S.C. § 434(f)(3)(B)(i). The Supreme Court has warned that the press exemption should be narrowly construed. In rejecting a press exemption claim by an incorporated entity the Court stated, "A contrary position would open the door for those corporations and unions with in-house publications to engage in unlimited spending directly from their treasuries to distribute campaign material to the general public, *thereby eviscerating § 441b's prohibition*." *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986)(emphasis added).

The facts presented by requestor, Paradigm Shift Productions, are somewhat different from the traditional situation where a media entity, such as a radio or television station, buys a program from a production company and then itself is responsible for selling advertising for the program. In its request, Paradigm Shift Productions indicates that it is a production company that wishes to buy airtime from KJLL, an Arizona radio station, and then "resell[] some of that airtime for third party advertisements." Advisory Opinion 2005-19 at 4.

Obviously, corporate activity normally covered by the prohibitions of the electioneering communication restriction, § 441b(a) and (b)(2), or the general corporate prohibitions of the Act, § 441b(a), should not be shielded through the artifice of a production company hastily constructed in the heat of a political campaign. For example, a candidate's supporters should not be able to use corporate or labor money to set up a production company that buys blocks of airtime for what is, essentially, an 'infomercial' advocating a federal candidate's election or defeat. In our view, this sort of activity would be akin to traditional political advertising and clearly would be prohibited. The mere fact that a 'production company' was used or that the message was communicated via a broadcasting station would not warrant application of the statutory press exemption.

The request indicates the activity proposed by Paradigm Shift Productions is not of the sort just described. Rather than simply buying airtime, Paradigm Shift Productions will be, in turn, reselling some of that time for third party advertisements. Further, "Paradigm Shift Productions is in the business of producing on a regular basis a radio program that disseminates news stories, commentary and/or editorials." Advisory Opinion 2005-19

[7] The Act also separately defines "contribution" and "expenditure" at 2 U.S.C. § 431(8) and (9). Because these definitions are built into the definition of "contribution or expenditure" at § 441b(b)(2), the relevant exceptions also are built into this latter term. Thus, the press exemption at § 431(9)(B)(i) applies to § 441b(b)(2). Further, because the statute treats coordinated "expenditures" as "contributions," 2 U.S.C. § 441a(a)(7)(B)(i), the Commission by regulation has built a press exemption into the definition of "contribution" at 11 CFR 100.73.

at 4. Finally, "[n]either Paradigm Shift Productions nor KJLL is in any way owned or controlled by any political party, political committee, or candidate." *Id*. at 2. As a result, it appears there are legitimate commercial considerations underlying both its operation and the purchase of advertising time by its sponsors. Based on the specific facts presented in this advisory opinion request, we agreed with the Commission's conclusion that Paradigm Shift Productions' proposed activity fits within the press exemption.

As a separate matter, we wish to discuss briefly the treatment of certain communications under the electioneering communication provisions and the coordination rules. While a particular communication may, on its face, appear to satisfy the general definition of electioneering communication (because it is a radio or television communication run close to an election that mentions a federal candidate), if it is coordinated with a candidate, it would not qualify as an electioneering communication because of a separate exemption in the law for reportable "expenditures." Specifically, the statute exempts from the definition of electioneering communication "a communication which constitutes an expenditure or independent expenditure under this Act." 2 U.S.C. § 434(f)(3)(B)(ii). The Commission, in turn, by regulation interpreted this exemption to reach an expenditure or independent expenditure "provided that [it] is required to be reported under the Act or Commission regulations." 11 CFR 100.29(c)(3). Because a "coordinated communication" is an in-kind contribution that must be reported by the benefiting candidate as an "expenditure," 11 CFR 109.21(b)(1), it is exempt from the definition of electioneering communication.

In circumstances where the press exemption is not in play, this becomes important because under the in-kind contribution rules the person paying for the communication may be subject to more rigorous funding restrictions. For example, an individual or unincorporated entity would have to adhere to a contribution limit on the amount spent ($2,100 per election on behalf of a federal candidate; 2 U.S.C. § 441a(a)(1)(A); Price Index Increases for Expenditure and Contribution Limitations, 70 Fed. Reg. 11658, 11659 (Mar. 9, 2005)). By contrast, if a communication by such person fits under the electioneering communication rules, there is no overall limit on the amount spent.[8]

We would have preferred that the opinion issued to Paradigm Shift Productions somehow reference these rules so no one would conclude the Commission will disregard

[8] Of course, if the spender is a corporation or labor organization, the communication is prohibited altogether, whether characterized as an electioneering communication or as an in-kind contribution. *See* 2 U.S.C. § 441b(a), (b)(2).

For reporting purposes, the distinction between electioneering communications and in-kind contributions can be significant. For example, an individual making an electioneering communication would have to report such spending if it exceeded $10,000 in a calendar year, 2 U.S.C. § 434(f)(1), but would not have to report such an amount if it were an in-kind contribution. In the latter case, though, the benefiting candidate's committee would have to report the in-kind contribution as if it had received a contribution and made an expenditure. 11 CFR 104.13, 109.21(b).

them in circumstances where the press exemption is not available.[9] Moreover, because of the press exemption from the definition of "contribution," 11 CFR 100.73, the result would have been the same if the facts involving candidate appearances on the radio program were analyzed as coordinated communications. We hope this concurring opinion will help preserve the important legal distinctions in this area.

_____ _____(signed)_____
Date Scott E. Thomas
Chairman

_____ _____(signed)_____
Date Danny Lee McDonald
Commissioner

[9] In Advisory Opinion 2004-33, the Commission mistakenly implied that a Ripon Society TV ad in which a federal candidate would appear would constitute an electioneering communication notwithstanding the fact that it would have constituted a coordinated communication required to be reported as an in-kind contribution (and hence as an "expenditure") by the candidate involved. The Commission simply neglected to apply the exception to the electioneering communication definition for "expenditures" that must be reported under the Act. 11 CFR 100.29(c)(3). While some commissioners may see a distinction between "expenditures" that have to be reported by the *spender* (*e.g*, an in-kind contribution made by a reporting "political committee") and "expenditures" that only would have to be reported by the *benefiting candidate* (*e.g*., an in-kind contribution by an individual), we see no such distinction in the statute or Commission regulations. As it turned out in the Ripon Society opinion, the group was incorporated, so the communication would have been prohibited whether treated as an electioneering communication or an in-kind contribution. Nonetheless, anticipating other circumstances arising, we believe the Commission should clarify whenever possible that a coordinated communication cannot escape regulation as such through disregard of the 'reportable expenditure' exemption in the electioneering communication rules.